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In the Supreme Court of the United States

October Term, 1970
No. 1160

DEVAL AERODYNAMICS, INC., A PENNSYLVANIA CORPORATION.
DEVAL AERODYNAMICS, INC., A DELAWARE CORPORATION.

Petitioners

vs.

GEORGE R. EULO.

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RICHMAN & RICHMAN.
By: JACOB S. RICHMAN.
Counsel for Petitioners.

43 South 19th St.,
Philadelphia, Pa. 19103.

Merrill Printing Co., Law Printers, Box 188, Bryn, Pa. 19020
Joseph P. Matthews, Philadelphia Representative, 567-6488

TABLE OF CONTENTS

	Page
Petition for Writ of Certiorari:	
Opinions Below	1
Jurisdiction	2
Questions Presented for Review	3
Statutory Provisions Involved	5
Statement of the Case	6
Reasons for Granting the Writ:	
1. Eulo released DeVal of all claims	12
2. There is no evidence in the record as to the value of Eulo's services as a full time sales executive	13
3. A new trial should be granted as to the quantum meruit finding which is against the weight of the evidence	16
4. DeVal's request for instructions on illegality of contract is in the original record of the District Court and is available	18
5. The Circuit Court erroneously reversed the District Court's grant of a new trial based on illegality by violation of Securities Act of 1933	19
Conclusion	22
Appendix:	
1. Opinion and Judgment of Court of Appeals	23
2. Opinion of District Court	37
3. Regulations and Statutes Involved	54

CITATIONS

Cases:

Baumgartner v. Burnham, 93 Pa. 88 (1880) 13

Crawford v. Ozark Ins. Co., 134 S.W. 931 (Ark. 1911) 12

Evers v. Gilfoil, 247 Mass. 219 (1924) 17

F. D. Rich Co. v. Wilmington Housing Authority, 392 F. 2d 841 (C.A. 3, 1968) 12

Gordon v. Youmans, 358 F. 2d 261 (C.A. 2, 1965) 13

Guter v. Donaldson Iron Co., 69 D. & C. 130 (Pa. 1949) 17

Hall v. Cappell, 74 U.S. 244 (1869) 21

Hardt v. Heller Bros. Inc., 171 F. 2d 644 (C.A. 3, 1948) 18

In Re Herbert Candy Co., 43 F. Supp. 588 (E. D. Pa. 1942) 14

Gannyan vs. Winchester Repeating Arms Company, 102 U.S. 339 (1881) 21

Penna. vs. Continental Casualty Co., 115 P.L.J. 216 (Pa. 1957) 18

Peters v. Watson Co., 241 Pa. 2d 411 (Wash. 1932) 12

Plymouth Mutual Life Ins. Co. v. Illinois Mid-Continent Life Ins. Co., 378 F. 2d 389 (C.A. 3, 1967) 12

Pollack v. Carlyle Dress Corp., 76 F. Supp. 755 (E.D. Mo. 1948) 17

St. Paul Fire & Marine Ins. Co. v. Tennefos Construction Co., 396 F. 2d 623 (C.A. 8, 1968) 13

Thompson v. Krumheim, 178 F. 2d 476 (C.A. 6, 1949) 14

Wallace v. Ford, 29 Pa. 184 (1858) 17

Walsh v. Durepo, 71 A. 2d 103 (R.I. 1950) 16

Statutes:
Securities Act of 1933, U.S.C., Title 15:
Sec. 77(j) 5
Sec. 77(aa) 5
Sec. 77(1) 5
28 U.S.C. Sec. 1254 (1) 2
41 U.S.C.A. §1, 1.30 et seq. 11
Miscellaneous:
Code of Federal Regulations, Title 41, Sec. 1-1.309, 1-1.302 5
C.C.H., Government Contract Reports, §809.09 (A) (F-2) 11
1 Conrad, Modern Trial Evidence (1936), sec. 94, p. 106 16
35A C.J.S., pp. 357-8 21
70 C.J.S., p. 314 18
98 C.J.S., sec. 65 (b) (1), p. 820 17
19 P.L.E., sec. r, p. 346 18
2 Restatement, Contracts, sec. 306 20

IN THE
SUPREME COURT OF THE UNITED STATES

No. October Term, 1970

Deval Aerodynamics, Inc., A Pennsylvania Corporation
Deval Aerodynamics, Inc., A Delaware Corporation
Petitioners

v.

George R. Rule
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The petitioners, Deval Aerodynamics, Inc., of Pennsylvania, and Deval Aerodynamics, Inc., of Delaware, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in this proceeding on August 7, 1970.

(A) OPINIONS BELOW

The opinion of the Court of Appeals appears in 430 F. 2d 335 (C.A., 1970), (reference therein to citation of lower court's opinion as 47 F.R.D. 35 is erroneous and refers to another case between the same parties). The opinion of the District Court of the Eastern District of Pennsylvania appears in the record, Appendix 105a-120a.

(B) JURISDICTION

The judgment of the Court of Appeals of the Third Circuit was entered on August 7, 1970. A timely petition for rehearing en banc was denied on September 25, 1970, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. sec. 1254 (1).

(C) QUESTIONS PRESENTED FOR REVIEW

1. *Release-Judgment N.O.V.* Where plaintiff agrees to release any and all claims against the defendant, if any there be, as of May 9, 1961, in consideration of the controlling shareholder's agreement that 20,000 shares, held in escrow, shall become plaintiff's property as of May 17, 1961, delivery to be postponed until consummation of sale of controlling shares, and plaintiff thereafter acts as if he is the owner of the 20,000 shares, is the release effective prior to the delivery of the 20,000 shares so as to justify the District Court's judgment n.o.v. for the defendant?

2. *Quantum Meruit-Judgment N.O.V.* Where defendant employs plaintiff as a full-time sales executive at a $200.00 weekly salary, and plaintiff claims more, based on a 5 percent commission of government contracts secured, which claim the jury rejects, may the jury, nevertheless, find for the plaintiff on a commission basis under quantum meruit, where the only evidence of value of service is testimony of the usual and customary remuneration of manufacturer's representatives who are independent contractors working for many manufacturers, pay their own expenses and receive commissions on sales?

3. *Quantum Meruit-New Trial.* Where a jury, on a record which is "somewhat thin on this damages issue," finds for the plaintiff, a full-time sales executive, in the sum of approximately $62,000 per annum based on a percentage formula of sales, in the face of testimony that full-time sales executives of defendant received only

$10,400.00 per annum, and that thereafter plaintiff himself, as President, accepted a salary of $15,600.00 per annum, and the jury also awarded $31,380.30 interest on the unliquidated claim, is the quantum meruit verdict against the weight of the evidence so as to justify a new trial?

4. *Illegality-Influence Peddling.* Where affirmative defense, asserted and argued throughout the case, of illegality based on 5 percenter influence peddling, and defendant's request for instructions to jury on illegality is refused, but the District Court fails to file the request in the record, may the Circuit Court of Appeals reject this defense because it is not part of the record on appeal?

5. *Illegality-Violation of Securities Act of* 1933. Where plaintiff violates the Securities Act of 1933 by permitting an allegedly false statement as to his remuneration to remain unchallenged, and this illegality is first raised by the District Court in its opinion granting a new trial, may the Circuit Court of Appeals reverse the grant of a new trial on this ground?

(D) STATUTES AND REGULATIONS INVOLVED

1. *Illegality-Influence Peddling.* Code of Federal Regulations, title 41, sec. 1-1.500, 1-1.502.

2. *Illegality-Securities Law of* 1933. United States Code, Title 15: secs. 77 (j), 77 (aa) & 77 (l).

(E) STATEMENT OF THE CASE

Respondent, hereinafter called Eulo, brought this diversity action against his former employer, the petitioner, hereinafter called DeVal (formerly known as Carco Industies, Inc.), on an oral agreement to pay five (5%) percent commissions contingent on securing government contracts, as a full-time sales executive. The jury awarded Eulo $135,981.33 on a percentage basis on quantum meruit. The District Court entered a judgment n.o.v. for DeVal on the ground of release, and an alternative new trial because of confusion of the jury and illegality due to Eulo's violation of the Securities Act of 1933. Eulo appealed and the Circuit Court of Appeals reversed the judgment n.o.v., granted a new trial as to the issues of release and executory accord but refused to have the new trial encompass the issues of illegality for influence peddling and Securities Act violations, of whether Eulo produced any evidence to support a quantum meruit as a full-time employee and, of interest on an unliquidated claim.

In July 1959, DeVal employed Eulo at a weekly salary of $200.00, as a full-time sales executive to secure government contracts. In October 1960, DeVal "went public," issued a prospectus and filed a registration statement referring to remuneration for Eulo as follows:

Remuneration

No officer or director of the Company received as much as $30,000 aggregate direct remuneration dur-

ing the fiscal year ended August 31, 1960 and no one will receive as much as $30,000 of remuneration during the fiscal year ending August 31, 1961. The aggregate direct remuneration for all directors and officers of the Company as a group during the fiscal year ended August 31, 1960 was $29,000. The Company does not have employment agreements with any executive officers.

During the fiscal year ending August 31, 1961 the Company will pay salaries to all of its directors and officers, as a group, at the rate of approximately $60,000 per annum. The foregoing includes Mr. George R. Eulo's salary of $10,000 for the fiscal year ending August 31, 1961 but does not include a bonus he may receive based upon the Company's sales performance which is not expected to exceed $40,000. There is no verbal or written commitment by the Company as to the extent or amount of such bonus, which, if any, will be determined by the Board of Directors. All remuneration is paid by the wholly-owned subsidiary. There is no present intention of establishing any additional bonus, profit-sharing, pension, retirement or deferred remuneration or incentive plan or granting of any stock options in addition to those set forth under "Stock Options" herein.

On May 9, 1961, Eulo was elevated to the position of President of Deval accepting a weekly salary of $300.00. On the same day, Charles A. Russo, hereinafter called Russo, entered into a written agreement to sell the controlling shares of DeVal, and executed to Eulo two letters dated May 9, 1961 and May 17, 1961 as follows:

Statement of the Case

George R. Eulo
100 Third Avenue
Haddon Heights, New Jersey

May 9, 1961

Dear Sir:

Reference is made to an agreement made this date between the undersigned and Lomasney, Loving & Co. for the sale and purchase of 100,000 shares of Carco Industries, Inc. common stock.

Upon the payment of the sum of $500,000 to me, as provided therein, I agree to deliver to you 20,000 shares of Carco common stock, free of charge and any obligation on your part for the said shares of stock, including the gift tax if any.

I agree to deliver the said 20,000 shares of Carco common stock to Grace National Bank of New York, as Escrow Agent, endorsed in blank, with instructions to deliver the said 20,000 shares of Carco common stock to you upon my receipt of the sum of $375,000, representing the balance of the purchase price payable under the aforesaid agreement.

I further agree to deposit with the Escrow Agent sufficient funds for the documentary tax stamps to be affixed to the said 20,000 shares of Carco common stock, if any be required.

I further agree to execute any other documents necessary or required to effectuate the terms herein.

You agree to release any and all claims against Carco Industries, Inc., if any there be, as of this date.

Very truly yours,
(s) Charles A. Russo
Charles A. Russo

Agreed and Accepted this 9th day of May 1961.

(s) George R. Eulo
George R. Eulo

May 17, 1961

Mr. George R. Eulo
100 Third Avenue
Haddon Heights, N. J.

Dear Mr. Eulo:

Reference is made to a letter agreement dated May 9, 1961, delivered to you by the undersigned.

I agree that the 20,000 shares of Carco common stock referred to in the aforesaid letter shall become your property as of the date of this letter. Delivery of said stock shall be made to you by the Escrow Agent on May 9, 1962, or sooner, if the 100,000 shares deposited with the Escrow Agent is delivered to Lomasney, Loving & Co., under an agreement dated May 9, 1961.

It is understood that the said 20,000 shares of stock shall be held by you, and not be distributed or sold prior to Aug. 31, 1962. In any event, said shares are not to be sold unless the sale shall comply with the requirement of the Securities Act of 1933, as amended.

I have requested Harold A. Lipton to send the Escrow Agent a copy of this letter.

Yours very truly,
(s) Charles A. Russo
Charles A. Russo

CAR:bdp

Statement of the Case

The Board of Directors of DeVal on August 8, 1961, at a meeting presided over by Eulo:

> "Resolved, that the Board of Directors having been informed that as of May 9, 1961, George R. Eulo became the owner of 20,000 shares of the Company's common stock, said shares having been transferred to George R. Eulo by Charles Russo and Josephine Russo, pursuant to the terms of the Sales Agreement between Charles Russo, et al., and various purchasers, dated May 9, 1961 and Letter Agreement dated May 17, 1961, and George R. Eulo having requested the transfer of the said shares to his name, that the Executive Vice President and/or Secretary of the Company are directed to take whatever steps they deem necessary to endeavor to effectuate the immediate transfer to George R. Eulo of stock certificates representing the 20,000 shares of the Company's common stock;"

Eulo was dismissed as President of DeVal on January 5, 1962. On August 18, 1962, he sued DeVal for 5 percent commission on all sales secured by him up to May 9, 1961, less moneys received by him. DeVal defended on the ground that the oral agreement was similar to that expressed in the prospectus, being salary and bonus, depending on sales performance which, however, resulted in a loss of $431,000.00; release by virtue of the letters of May 9 and May 17, 1961; illegality because of influence peddling and other grounds.

At the trial DeVal's witness testified that a full-time sales executive is not customarily paid commissions. Eulo testified as to his contacts, connections and influence with government purchasing agents. DeVal's request for instructions to the jury, No. 4, which the District Court refused, was:

4. If you believe that the defendant-corporations, acting through their agent, Charles A. Russo, entered into a contract to pay compensation to plaintiff because of special influence, connections and contacts with government agencies, then such contract for compensation would be illegal and the verdict should be entered for the defendants.

41 U.S.C.A. §1, 1.50 et seq.;

C.C.H., Government Contract Reports, §860.09 (A) (F-2).

The jury, in special interrogatories, rejected Eulo's commission claim and DeVal's salary plus bonus defense, and found for Eulo on quantum meruit in the amount of $135,981.33 including interest of $31,380.30, based on a formula of 5 percent on the first $500,000.00 of sales, and 3 percent on the balance.

The District Court, as stated above, granted DeVal's motion for judgment n.o.v., and alternative new trial. Eulo appealed and the Circuit Court reversed the judgment n.o.v. and the alternative order for new trial, refused DeVal's motion for judgment n.o.v. grounded on failure of Eulo to introduce any evidence of the value of his services as a full-time sales executive, ordered a new trial restricted to the issues of release and executory accord and refused to include in the order for a new trial DeVal's assertions that the quantum meruit verdict was against the weight of evidence, that no interest was allowable on an unliquidated, disputed claim for services, and illegality as to influence peddling and violation of the Securities Act of 1933. DeVal raised these questions on a petition for rehearing which was denied.

(F) ARGUMENT

1. *Eulo Released DeVal of All Claims*

The release clause in the letter-agreement of May 9, 1961 reads: "You agree to release any and all claims against Carco Industries, Inc., if any there be as of this date." A careful scrutiny of this clause, including attention to the punctuation, makes it eminently clear that it constitutes a release as of May 9, 1961 of all Eulo's claims against DeVal. The commas surrounding the phrase "if any there be," render the phrase "as of this date" unambiguously applicable to the release and not to the claims. This latter parenthetical phrase causes the prepositional phrase "if any there be" to modify the release and not the claims, if any there be, *Crawford v. Ozark Ins. Co.*, 134 S.W. 951, 952 (Ark. 1911). Eulo wants to eliminate the comma before the parenthetical phrase so as to cause the clause to read as if Eulo agrees to release DeVal of any or all claims, if any there be as of this date, thereby indicating that the date relates only to the claims and not to the release, *Peters v. Watson Co.*, 241 P. 2d 441, 442 (Wash. 1952). "Since the meaning of the provision of the settlement agreement is . . . unambiguous, a hearing to determine intent is unnecessary," *Plymouth Mutual Life Ins. Co. v. Illinois Mid-Continent Life Ins. Co.*, 376 F. 2d 389, 392 (C.A. 3, 1967); *F. D. Rich Co. v. Wilmington Housing Authority*, 392 F. 2d 841, 842 (C.A. 3, 1968).

This conclusion is confirmed by the supplementary letter of May 17, 1961 from Russo to Eulo, wherein Russo agreed "that the 20,000 shares . . . shall become your property as of the date of this letter." These letters, as read together, *St. Paul Fire & Marine Ins. Co. v. Tennefos Construction Co.*, 396 F. 2d 623, 629 (C.A. 8, 1968); *Gordon v. Youmans*, 358 F. 2d 261 (C.A. 2, 1965), in return for the immediate transfer of the ownership of stock to Eulo, he immediately released DeVal of all his claims. This conclusion is reinforced by the resolution of the Board of Directors of DeVal (of which Eulo was a member) of August 8, 1961, stating that Eulo had informed the Board of Directors that he "became owner of 20,000 shares of the Company's common stock, said shares having been transferred to George R. Eulo by Charles Russo and Josephine Russo, pursuant to the terms of the Sales Agreement between Charles Russo, et al., and various purchasers, dated May 9, 1961 and Letter Agreement dated May 17, 1961."

From all these unchallenged writings, the District Court was clearly justified in finding, as a matter of law, that in May 1961 Eulo released DeVal from all his claims for services. It is unnecessary to determine the conflict of laws issue as to where the release was executed or the construction issue as to whose agent drafted the letters.

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2. *There Is No Evidence in the Record as to the Value of Eulo's Services as a Full Time Sales Executive*

DeVal has always contended that Eulo had adduced no evidence of the value of his services as a full time sales

executive, but had only produced testimony as to the value of his services as a manufacturer's representative who is an independent contractor working for more than one supplier, "paying all of his own sales expenses, salaries of any persons he employed, all traveling expenses and telephone and secretarial expenses, and is not on the social security records of the corporation, the compensation records or withholding tax records." *Thompson v. Kronheim*, 178 F. 2d 476 (C.A. 6, 1949); *In re Herbert Candy Co.*, 43 F. Supp. 588, 589 (E.D. Pa. 1942).

Eulo introduced no evidence relating to the value of his services as a full time sales executive, erroneously devoting his attention to the customary compensation of manufacturer's representatives. Eulo did submit many compensation contracts, from which it is clear that as a full time executive, he received salaries whereas as a manufacturer's representative for the same employer, he received commission. When he was general manager for Super Electric Products, he was on salary plus bonuses on profits (App. T. 10), whereas when he worked as a manufacturer's representative he received a commission (App. T. 126-7). When he was President and Director in charge of sales for New England Transformer Company (App. T. 11-2), he was on salary (App. T. 134), whereas as a manufacturer's representative he received 5 percent (App. T. 135). When Platt Manufacturing Co. offered him a choice of a full time position of executive vice-president, the offer provided for salary and no commission (App. T. 476), whereas he accepted the relationship of manufacturer's representative with commission on sales (App. 165a).

Eulo also testified that when, on May 9, 1961, he was advanced from Vice-President in Charge of Sales to the

position of President, he accepted as full compensation, for the same services plus additional responsibilities, without commission, the salary of $300 per week (App. T. 549).

Other evidence in the record of the value of the services of DeVal's full-time executives in August 1960 (when it was not suffering losses) were the salaries of $10,000 per annum to Russo, President; Bello, Executive Vice-President; Kinkle, Vice-President in Charge of Engineering and Sopinski, Vice-President in Charge of Manufacturing (App. T. 753-4). The largest compensation was that of Eulo, and Baldinger who was President of Deval from January 5, 1962 to August 16, 1962, which was $400 per week. There is no evidence at all of any full-time executive receiving a commission on gross sales, as found by the jury. Baldinger makes this very clear when he testified that a full time employee does not receive commissions on sales (App. T. 861-863). Counsel, tediously and in great detail, has searched the entire record and can find no support for this conclusion. Perhaps Eulo and the Circuit Court fell into error by considering the value of services rendered without regard to the position or relationship of the parties who performed the services. For not only must the evidence demonstrate that the services rendered were similar, but they must also be performed by a person in the same business, or similarly situated or employed. A full-time sales executive and a manufacturer's representative are not in the same business nor are they similarly employed or in the same capacity. As stated in *Baumgartner v. Burnham*, 93 Pa. 88, 90-1 (1880):

> "The true question for the jury was, what was the ordinary price for such work and materials charged

by other persons in the same business as the plaintiffs."

As set forth in 1 *Conrad, Modern Trial Evidence* (1956), sec. 94, p. 166: "Evidence as to reasonable value of services in one capacity is not proof of the reasonable value of his services in another capacity." Thus, in *Watson v. Durepo*, 71 A. 2d 103, 106 (R.I. 1950), although a non-real estate broker performed the same services as a licensed real estate broker, nevertheless, the value of the services performed by the latter may not be used to prove the value of the services of the former.

The jury refused to answer Interrogatory No. 5 (App. 68a-69a) which was the only interrogatory designed to obtain a finding as to the fair value of the services of a full-time employee, making it eminently clear that there was no evidence upon which to base such a finding.

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3. *A New Trial Should Be Granted as to the Quantum Meruit Finding Which Is Against the Weight of the Evidence*

DeVal contends that Eulo presented no evidence specifically directed to establishing the reasonable value of Eulo's services as a full-time sales executive, and his testimony related solely to value of the services of a manufacturer's representative. There is, however, as stated above, much evidence in the record which indirectly indicates the value of such services. Eulo, upon termination of his position as vice-president in charge of sales, accepted a salary of $300 per week as president of DeVal for

the same services with added executive responsibilities. This should be considered as fairly conclusive evidence of value, 98 *C.J.S.*, sec. 65 (b) (1), p. 820; *Wallace v. Ford*, 29 Pa. 184 (1858); *Pollack v. Carlyle Dress Corp.*, 76 F. Supp. 755, 764 (E.D. Mo. 1948); *Evers v. Gilfoil*, 247 Mass. 219 (1924). So also the salary of Baldinger who succeeded Eulo as president and the salaries of $200 per week paid to all the other of DeVal's executives, or the offer of salary by Platt Manufacturing Co. to Eulo when he resigned from DeVal (App. T. 476). Also significant is the fact that immediately before and after Eulo's employment by DeVal he only earned as a manufacturer's representative between $10,000 and $15,000 per annum (App. T. 151-2, 167-8) in comparison to the jury's quantum meruit finding of approximately $62,000.00 per annum.

Eulo accepted weekly payroll checks of $200 each from July 1959 to May 1961. Although he testified that these checks were on account of commissions, the jury disbelieved him. The fact, therefore, as found by the jury, is that there was no agreement other than one establishing a $200 per week salary. Since "the acceptance of such wages raises a presumption that the parties agreed on that figure," *Guter v. Donaldson Iron Co.*, 69 D. & C. 150, 161 (Pa. 1949), and the jury has conclusively found that there is no express agreement as to commissions and there was no evidence of profits upon which to predicate a bonus, the presumption of agreed salary remains unrebutted and must therefore be declared as an express agreement to accept $200 per week as the total compensation for the services rendered.

There exists also the fortifying rule that "where the relations of the parties are such as to call for periodic pay-

ments by one to the other, and periodic payments are made, there is a rebuttable presumption that each payment was in full settlement of all claims arising out of such relations up to the date of such payment." 70 *C.J.S.*, p. 314.

In view of the fact that "the record is somewhat thin on this damages issue," since Eulo specifically and directly presented no evidence of the value of his services as a full time sales executive, this matter should be remanded for a jury trial on this issue.

The jury, in its calculations, awarded interest to Eulo for five years amounting to $31,380.30. This was improper because where a claim is unliquidated, and a quantum meruit claim truly is unliquidated, interest does not run with the claim, 19 *P.L.E.*, sec. r, p. 546; see *Hardt vs. Heller Bros. Inc.*, 171 F. 2d 644, 648-9 (C.A. 3, 1948). "The only prerequisites to the running of interest are that the debt be liquidated with some degree of certainty and the duty to pay it has become fixed." *Penna. vs. Continental Casualty Co.*, 115 P.L.J. 216, 220 (Pa. 1957).

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4. DeVal's Request for Instructions on Illegality of Contract Is in the Original Record of the District Court and is Available

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DeVal's Request for Instructions to the Jury, relating to illegality for influence peddling was refused by the District Court which inadvertently failed to include the request in the record. Since requests for instructions to the jury are part of the original record and "the entire record is always available to the court for reference and exam-

ination," this request for instructions should have been accessible to the court. It is now brought to the attention of the court for consideration. The nature of DeVal's defense as to illegality was not only outlined in its briefs, but also in its motion to dismiss (App. 41a), affirmative defense, Par. 15(b) (App. 47a), and motion for judgment n.o.v., Par. 6 (App. 107a). Justice requires that this issue also be remanded for a new trial.

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5. *The Circuit Court Erroneously Reversed the District Court's Grant of a New Trial Based on Illegality by Violation of Securities Act of* 1933

The Circuit Court declared that evidence of Eulo's acquiescence in the representation in the prospectus in violation of the Securities Act of 1933 was very sparse. This is obviously wrong. As the lower Court points out in its opinion (App. 123a):

> "But it is clear from plaintiff's own testimony that he knew of the representation within very few days after it was originally furnished to counsel, and that at no time did he make any attempt to alert counsel handling the stock issue, the underwriters, the public, the SEC, or anyone else, that this representation was inaccurate." (See App. T. 298-9, 404-5.)

The Securities Act of 1933 is designed for the protection of the investing public and not for the corporation that is going public. The purchasers of shares of DeVal are entitled to rely on the accuracy of the representations in the prospectus and to depend on the honesty of the offi-

cers of the corporation, including Eulo, to whom the provision for a $40,000 bonus applied. If a verdict beyond the $40,000 set forth in the prospectus is allowed to go unchallenged, then these innocent investors and shareholders will be the ultimate sufferers since bankruptcy will inevitably wipe out their investment.

Where a situation is contaminated by such illegality as to harm substantially the innocent investors, then the Court must entertain this defense at any stage of the proceedings for where the illegality overwhelmingly affects the public, the Court must not be a party to the granting of the claim of a plaintiff seeking the profits of his illegal activities. As stated in 2 *Restatement, Contracts*, sec. 598, comment (a):

> ". . . the rule of public policy that forbids an action for damages for breach of such an agreement is not based on the impropriety of compelling the defendant to pay the damages. That in itself would generally be a desirable thing. When relief is denied it is because the plaintiff is a wrongdoer and to such a person the law denies relief. Courts do not wish to aid a man who founds his cause of action upon his own immoral or illegal act. If from the plaintiff's own statement or otherwise it appears that the bargain forming the basis of the action is opposed to public policy or transgresses statutory prohibitions, the courts ordinarily give him no assistance. The court's refusal is not for the sake of the defendant, but because it will not aid such a plaintiff."

Such a defense as illegality, involving a violation of a statutory prohibition, for the benefit of the general pub-

lic and not for the benefit of DeVal, may not be deemed waived when it develops at the trial and contains such impact as to cause the judge to grasp the violation as a basis for a new trial. For the violation of a law as basic as the Securities Act of 1933, designed to protect the gullible and often-imposed upon public, is so fundamental as to constitute a failure to state the claim upon which relief has been granted and may be considered without having asserted it as an affirmative defense, 35A *C.J.S.*, pp. 357-8.

The Supreme Court of the United States unequivocally accepts this rule. *Oscanyan vs. Winchester Repeating Arms Company*, 103 U.S. 539, 542 (1881), holds:

> "Here the action is upon a contract which, according to the view of the Judge who tried the case, was a corrupt one, forbidden by morality and public policy. We shall hereafter examine into the correctness of this view. Assuming for the present that it was a sound one, the objection to a recovery could not be obviated or waived by any system of pleading, or even by the express stipulation of the parties. It was one which the court itself was found to raise in the interest of the due administration of justice. The court will not listen to claims founded upon services rendered in violation of common decency, public morality or the law."

Hall v. Cappell, 74 U.S. 244, 248 (1869) declares:

> "Whenever the illegality appears, whether the evidence comes from one side or the other, the disclosure is fatal to the case. No consent of the defendant can neutralize its effect. A stipulation in the most solemn form to waive the objection would be tainted with the

vice of the original contract, and void for the same reasons. Wherever the contamination reaches, it destroys. The principle to be extracted from all the cases is, that the law will not lend its support to a claim founded upon its violation."

(G) CONCLUSION

The Court should not only uphold the District Court's entry of judgment n.o.v. as to release, but should also do so as to the quantum meruit verdict because of Enlo's failure to present a scintilla of evidence in support of such a verdict. Enlo is challenged to specify where, in a record which "is somewhat thin on this damages issue," there is any evidence of the value of services of a full-time sales executive. In the interest of justice, a new trial should be granted on the issues of quantum meruit, interest on disputed, unliquidated claims, illegality resulting from influence peddling, and from violation of Securities Act of 1933.

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Third Circuit.

Respectfully submitted,
Jacob S. Richman,
Counsel for Petitioners

APPENDIX

I.

OPINION OF COURT BELOW

UNITED STATES COURT OF APPEALS
For the Third Circuit

No. 17,947

George R. Enlo, *Appellant*

v.

DeVal Aerodynamics, Inc., a Pennsylvania corporation, DeVal Aerodynamics, Inc., a Delaware corporation, Josephine Russo, Individually, and as Administratrix of the estate of Charles A. Russo, deceased; and John A. Baldinger

Appeal From the United States District Court
For the Eastern District of Pennsylvania

Argued May 8, 1970

Before Freedman, Seitz and Van Dusen, *Circuit Judges*

OPINION OF THE COURT
(Filed August 7, 1970)

Seitz, *Circuit Judge.*

George Eulo brought this diversity action against his former employer, DeVal Aerodynamics, Inc.[1] (DeVal), Charles Russo,[2] the former president of DeVal, and John Baldinger.[3] Eulo sought compensation allegedly owed him by DeVal for services rendered during the period between March 15, 1969 and May 9, 1961.[4] His primary theory in seeking compensation was that DeVal had orally agreed, through its president Russo, to pay him a 5 percent commission on all government contracts he secured, calculated on the gross price of the contracts.[5] Alternatively he claimed entitlement to quantum meruit recovery.

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[1]DeVal Aerodynamics, Inc., is the name of two separate corporations—a Delaware holding company and a Pennsylvania manufacturer. They were formerly known as Carco Industries, Inc. We shall refer to both corporations in this opinion simply as DeVal. No party challenges the propriety of treating them as a single entity as the district court did.

[2]Russo died prior to the trial of this case. His widow was substituted as administratrix of his estate.

[3]Baldinger became president of DeVal upon Eulo's resignation in 1962. Since his dismissal as a defendant was not challenged below, we will not have cause to refer to him further.

[4]Eulo also sought damages for wrongful termination of his employment from DeVal. This claim was decided against Eulo by the jury and the verdict was not challenged below. Moreover, there is virtually no argument presented on appeal as to this claim by Eulo. Thus, we need not consider it further.

[5]In addition Eulo sought to hold Russo personally liable on this alleged oral agreement or alternatively for a breach of warranty of authority to bind the corporation if the oral agreement were held void for want of authority. The jury decided this claim

The case was tried before a jury which returned a $135,931.33 verdict on special interrogatories in favor of Eulo and against DeVal for quantum meruit damages and verdicts in favor of the Russo estate and DeVal on all other counts. Judgment was entered in favor of Eulo and against DeVal seven months after the verdict on September 23, 1968.[6] Shortly thereafter, DeVal filed a motion for judgment notwithstanding the verdict or alternatively a new trial. The district judge subsequently issued an opinion and order granting DeVal's motion for judgment n.o.v. and alternatively ordering a new trial in the event the judgment n.o.v. should be reversed. See Fed. R. Civ. P. 50(c). This appeal by Eulo followed.

Although the issues presented on appeal are not complex, the factual context out of which they arise is intricate and requires some explication. Prior to joining DeVal, Eulo's primary employment was as an independent manufacturer's representative. In this capacity he aided his clients primarily in their bidding on government contracts. In March 1959 Eulo met with Charles Russo, then president of DeVal. This meeting resulted in Eulo joining DeVal on a part-time basis for several months. He eventually gave up most outside activities and joined DeVal on a full-time basis. It is conceded that Eulo aided in securing and worked on government contracts totaling well over three million dollars for DeVal during the period involved in this suit. However, the precise agreement of

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against Eulo. The verdict for Russo's estate was not challenged below, nor is there more than a cursory argument offered on appeal. Thus, we need not consider the claim further.

[6] In view of the express language of Fed. R. Civ. P. 58, we cannot understand the delay in the entry of judgment.

employment between DeVal and Eulo was the key issue and was hotly contested at trial. Eulo claimed he had a 5 percent commission agreement with advances against commissions to cover day-to-day expenses. DeVal, in contrast, asserted that the "advances," amounting to $200 per week during most of the period in question, were Eulo's salary and that he was to be allowed a bonus only if the company were profitable.

In spite of the increased volume of business during Eulo's tenure with DeVal, DeVal did not show a profit. It went public in late 1960 and in early 1961 negotiations commenced for the sale of Russo's control block of stock to an outside group represented by Lomasney, Loving & Co. An agreement of sale was signed and Russo's shares were deposited in escrow. At the time of trial, however, the deal had not been consummated and the parties were involved in litigation in New York. A condition of the sale had been that Russo be replaced as president by Eulo. Eulo was elected president on May 9, 1961 and was subsequently reelected in November of the same year. However, on January 5, 1962 without any advance warning, the membership of the board of directors was substantially changed and Eulo's resignation was demanded and obtained. Following his abrupt dismissal Eulo brought this action.

During pretrial proceedings, the defendants moved for summary judgment alleging, *inter alia*, that Eulo's claims were absolutely barred by a release agreement dated May 9, 1961 which he had signed. The motion was denied without opinion. The defendants again invoked the release defense during the jury trial but the trial judge ruled that evidence concerning the proper interpretation

of the agreement was irrelevant and would not be admitted. He stated: "I am declaring as a matter of law as far as this case is concerned the release whether it be regarded executory accord or what have you, does not constitute a defense. . . ." The defendants were thus barred from offering evidence of their affirmative defense of release. Subsequently in vacating the jury verdict and ordering that a judgment n.o.v. be entered in DeVal's favor, the district judge reversed his position on the alleged release agreement which he had earlier characterized as no defense. This agreement, which had been executed at the time of the purchase of DeVal by the Lomasney group, was embodied in a letter from Russo to Eulo, which was signed by both men and dated May 9, 1961. It reads as follows:

"May 9, 1961

"George R. Eulo
100 Third Avenue
Haddon Heights, New Jersey

"Dear Sir:

"Reference is made to an agreement made this date between the undersigned and Lomasney, Loving & Co. for the sale and purchase of 100,000 shares of Carco Industries, Inc., common stock.

"Upon the payment of the sum of $500,000 to me, as provided therein, I agree to deliver to you 20,000 shares of Carco common stock, free of charge and any obligation on your part for the said shares of stock, including the gift tax, if any.

"I agree to deliver the said 20,000 shares of Carco common stock to Grace National Bank of New

York, as Escrow Agent, endorsed in blank, with instructions to deliver the said 20,000 shares of Carco common stock to you upon my receipt of the sum of $375,000, representing the balance of the purchase price payable under the aforesaid agreement.

"I further agree to deposit with the Escrow Agent sufficient funds for the documentary tax stamps to be affixed to the said 20,000 shares of Carco common stock, if any be required.

"I further agree to execute any other documents necessary or required to effectuate the terms herein.

"You agree to release any and all claims against Carco Industries, Inc., if any there be, as of this date.

Very truly yours,
(s) Charles A. Russo
Charles A. Russo

"Agreed and Accepted
this 9th day of May 1961

(s) George R. Eulo
George R. Eulo"

In reversing his trial ruling the judge said that "A careful reading of the letter of May 9, 1961, in light of the undisputed circumstances then prevailing, makes it clear that the parties undoubtedly intended the obligations created by that letter to replace whatever obligations were then owing the plaintiff by the defendant corporation." He concluded that in signing the letter Eulo "was granting a present release, in exchange for a conditional promise of substantial performance"; thus, he held the corporate obligation to Eulo had been extinguished and the

jury's verdict awarding damages based on those obligations could not stand.

On appeal Eulo contends that the letter-agreement was not intended to be and cannot be construed as a present release or discharge of DeVal's obligations. He argues that at most the agreement evidences a conditional promise to release when and if Russo performed; that there has not been and cannot be timely performance at this date because the sale to Lomasney has not been consummated; and thus, he is free to rescind the agreement and pursue his claim for compensation against DeVal.

DeVal, on the other hand, contends that the district court properly granted judgment n.o.v. either because the language of the letter-agreement evidences an intent to immediately discharge DeVal from all prior obligations to Eulo regardless of when the Russo stock might be delivered to him or because the letter-agreement is an unbreached executory accord which bars Eulo's compensation claim against DeVal unless Russo breaches it.

We do not believe the letter of May 9, 1961 is exclusively susceptible of either interpretation. The clause "you agree to release" in the last paragraph of the letter, depending on the relevant circumstances, could mean either that Eulo was presently discharging all corporate obligations or that he would discharge them when and if performance from Russo was forthcoming. Neither party has submitted, nor has the court found, persuasive authority for the proposition that either interpretation is the only possibly correct one.

Moreover, we cannot express an opinion concerning the validity of either side's interpretation of the agree-

ment or its theory on whether it has been breached based on the record made below, because the district court barred the parties from making a complete record on this issue. The release agreement was pleaded by DeVal as an affirmative defense. Thus, the defense bore the burden of establishing its existence and meaning. Yet early in the defense presentation the district court ruled out any further reference to the agreement or the circumstances surrounding it. The court ruled "as a matter of law" that the release constituted no defense. Thus, while some evidence appears in the record on this issue, neither side[7] was afforded a full opportunity to develop all the "operative usages and . . . all the circumstances prior to and contemporaneous with the making of the [letter-agreement]." Restatement of Contracts §230 (1932). As a result of this exclusionary ruling, there are serious deficiencies in the present record. For example, there was an incomplete development of evidence concerning who drafted the agreement and in what capacity. Since we believe that either of the proffered interpretations of the contract may be the correct one, knowing in whose behalf the contract was drafted might provide valuable guidance in interpreting it. In addition, the record does not clearly establish where the contract was executed. Such a consideration might be relevant in determining under the Pennsylvania choice of law rules which jurisdiction's law will control the interpretation of the contract. We believe it was error to inter-

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[7]The potential for prejudice of Eulo is especially serious. The release was part of DeVal's affirmative defense. It follows that Eulo's evidence would normally have been offered in his rebuttal case. Thus, the court's ruling effectively barred Eulo from making any record on this issue.

pret this contract without allowing the parties to at least develop evidence concerning the circumstances prior to and contemporaneous with its making.

Moreover Eulo contends that, starting with the May 9 agreement, the Russos have engaged in a course of conduct constituting fraud on him. Although he does not articulate what relief he is entitled to because of this alleged fraud, we conclude that he should be permitted to present evidence relevant to this defense on remand to the district court. We say this because, whether Eulo seeks to show a breach of an executory accord or that the agreement can be avoided because of fraud involved in its making, he has never been afforded an opportunity to present his evidence. In these circumstances the district court's post trial ruling that there was no fraud cannot stand.

DeVal contends, however, that even if the letter-agreement is not a bar to Eulo's claim, it is entitled to judgment n.o.v. because there was no competent evidence to support the jury's determination of the amount of quantum meruit damages. While the record is somewhat thin on this damages issue, Eulo did testify throughout concerning his duties and what he believed they were worth. The fact that this testimony was in major part intended to demonstrate the existence of an express agreement does not derogate from its competence as regards quantum meruit damages. To hold as DeVal urges would require us, in effect, to invoke the ancient and wisely rejected rule that a party is not competent to testify in his own behalf. We decline to do so.

The judgment n.o.v. must be reversed and the case remanded to the district court. On remand the district

judge will afford the parties an opportunity to offer evidence relevant to the task of interpreting the agreement and determining whether the agreement does present an absolute defense. In so doing, he will, of course, have to make reference to the applicable state law to determine what issues, if any, are appropriate for resolution by a jury.

The district court, as required by Fed. R. Civ. P. 50 (c), ruled on DeVal's alternative motion for a new trial. It ordered a new trial limited to the issues between Eulo and DeVal relating to Eulo's claim for additional compensation for services rendered between March 15, 1959 and May 9, 1961. Since it is possible that the letter-agreement could be interpreted in a manner that would not bar Eulo's claims, in the interests of judicial economy, we are required to consider whether the alternative order of a new trial ought to be sustained.

The court advanced two reasons for its conclusion that a new trial was required. First, the judge thought that the language of his jury instructions and of the special interrogatories may have left the jury with the impression that, if they were to reject the contentions advanced by each side concerning an express employment contract, they would be compelled to award Eulo a recovery based on quantum meruit. As we understand the district judge's position, he is apprehensive that the jury may have believed that if they were to find no contract of employment they were required to award Eulo damages beyond the amounts he had already received "on account" from DeVal. We have carefully analyzed the special interrogatories and the charge, and we conclude the trial judge's apprehensions are not supported by the record. Indeed, his

charge on this point was an explicit and, we believe, a correct statement of the applicable principle of law.[8]

The second reason advanced in the district court opinion for ordering a new trial concerned some statements in the corporate defendant's 1960 prospectus. That prospectus listed the salaries of the management group including Eulo. Specifically, it stated that Eulo "may receive [a bonus] based on the company's sales performance which is not expected to exceed $40,000.'"[9] Eulo, of course, contended at trial that this was an inaccurate description of his employment agreement. In his opinion the trial judge, however, found as a matter of law that Eulo had acquiesced in the prospectus representation. For this reason, he concluded that any verdict awarded against the corporation which exceeded $40,000 would be against the weight of the evidence as well as against public policy as an impermissible reward to Eulo for a violation of the Securities Act of 1933. 15 U.S.C. §§77(j), 77(aa) & 77(l).

In our view the district court's finding that Eulo had acquiesced in the prospectus representation is erroneous. The evidence of acquiescence in the record is sparse. At best it posed a jury issue. The defendants, however, did not plead or argue a public policy defense based on ac-

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[8]In explaining to the jury the available options the district judge said: "Now, this is based on what I discussed with you a while ago, this idea that if there was in fact no agreement, what was the fair and reasonable value of his services. Was the fair and reasonable value of his services anything over and above what he actually received? If so, what was the amount?" Transcript 1049.

[9]October 13, 1960 Prospectus of Carco Industries, Inc., at page 9.

quiescence and the jury was not requested to make findings on this issue. In view of these factors, we conclude the district court committed error in resolving this issue against Eulo. Thus, it follows that this erroneous conclusion, which is essential to the public policy defense, cannot justify the order for a new trial on the ground that a jury verdict in excess of $40,000 would violate public policy.

In addition, to the extent the prospectus statement and Eulo's alleged acquiescence in it constitute evidence of an express employment agreement, they presented a jury issue. The jury's verdict clearly indicates they resolved this issue against DeVal. Thus, it follows the district court erred in relying on Eulo's alleged acquiescence in the prospectus representation as a reason for concluding that the verdict was against the weight of the evidence.

DeVal contends, however, that it is entitled to a new trial on a ground not adverted to by the district court in its opinion. It contends the district court impermissibly restricted its cross-examination of Eulo concerning an article about "5-percenters." Eulo, however, had not read the article and was not mentioned in it. Moreover, DeVal concedes that this cross-examination was intended to elicit proof that Eulo's services as a manufacturer's representative were of little value. DeVal was afforded ample opportunity to cross-examine Eulo concerning the value of his services. The exclusion of cross-examination on this article was not erroneous.

DeVal also contends that it was erroneously barred from developing evidence that Eulo acquiesced in misrepresentations in bids which DeVal submitted to govern-

ment agencies. The bid forms apparently require a representation that no part-time commission employees worked on the bid. Eulo, however, admitted knowledge of the representations in bids he worked on prior to becoming a full-time employee of DeVal. Any further questions would have been repetitive and were properly barred.

DeVal also contends it is entitled to a new trial because the district court refused its suggested charge concerning the alleged illegality of Eulo's contract with DeVal. DeVal has not supplied the court with a copy of its requested charge. Nor does it appear in the original record. Nor has DeVal pointed to any place in the record where it objected to the judge's charge in the manner required by Fed. R. Civ. P. 51. On this record, we conclude DeVal's contention cannot be sustained.

DeVal also contends that the jury erroneously awarded Eulo compensation for contracts on which he did not work. There is no competent evidence in the record to support this contention and, thus, we find no merit in it.

Finally, DeVal urges the court erred in not charging the jury on its theory that the May 9, 1961 agreement was an executory accord which at the time of trial had not been breached. For the reasons given in the portion of this opinion dealing with the May 9 agreement we decline to rule on this contention. DeVal will be afforded an opportunity to make its argument on this issue to the district court. Whether a new trial is required on this basis will be for that court's determination.

The judgment of the district court will be reversed to the extent it grants judgment n.o.v. and alternatively orders a new trial in favor of DeVal. If on remand it is

ultimately determined that the instrument is not a bar to Eulo's action, the jury verdict based on Eulo's quantum meruit claim should be reinstated. The judgment entered on the jury verdicts in favor of the remaining defendants will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

II. OPINION OF DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA

Civil Action No. 31892

George R. Eulo,

Plaintiff

v.

DeVal Aerodynamics, Inc., a Pennsylvania Corporation,
Deval Aerodynamics, Inc., a Delaware Corporation,
Charles A. Russo and John A. Baldinger,

Defendants

OPINION

Fullam, *J.* March 27, 1969

Plaintiff recovered a verdict in the sum of $135,981.33 in this action for damages for breach of an employment contract. The defendant against whom the verdict was rendered[1] has filed motions for judgment n.o.v. and for a new trial.

[1]The original name of the corporate defendant was Carco, Inc. In 1960, the corporation changed its name to Deval Aerody-

The controlling stockholder and, until May 9, 1961, the dominant figure in the management of the corporate defendant was Charles A. Russo. He was originally named as a defendant in this action but has since died, and his administratrix has been substituted as a defendant.[2]

Plaintiff's claim against the corporate defendant included a claim for additional compensation for services performed between March 15, 1959 and May 9, 1961, and claims for damages and severance pay arising out of the sudden termination of his employment by the corporate defendant on January 5, 1962. As to the latter element, the jury expressly found that the plaintiff's discharge was not wrongful and that no severance pay was due him. These findings are not now in dispute; accordingly, the claims relating to plaintiff's discharge can be disregarded.

Plaintiff's claim for compensation for services performed between March 15, 1959 and May 9, 1961 was based upon two alternative theories: (1) an express oral agreement that the plaintiff was to be paid commissions of 5 percent of the gross amount of certain government contracts, payable at invoicing; or (2) if there was no express

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namics, Inc., a Pennsylvania corporation. In July of 1960, a Delaware corporation of the same name was formed for the purpose of acquiring all of the stock in the Pennsylvania corporation; the Delaware corporation "went public" in October of that year. For present purposes, the case will be treated as if there were a single corporate defendant, Deval Aerodynamics, Inc., without distinction as between the Pennsylvania and Delaware entities.

[2]Another individual, John A. Baldinger, was named as a defendant, but a directed verdict in his favor was entered, without objection, at the close of plaintiff's case. The jury's verdict exonerated the Russo estate.

agreement as to his compensation, the fair and reasonable value of his services on a *quantum meruit* basis, calculated at the rate of 5 percent of the gross amount of the same contracts. The defendant contended that there was no express agreement for commissions in any amount, but there was an express agreement that, if the corporation made a profit on the contracts in question, plaintiff would receive a bonus, the amount of which would be such that the plaintiff's total compensation would be equal to the total compensation received by Mr. Russo and a third employee, Mr. Bello, respectively. (It is clear from the evidence on both sides that the corporation sustained heavy losses during this period. While it is not possible to determine whether losses were sustained on the government contracts here involved, such was the import of some of the defense testimony. At any rate, since there was no evidence that the government contracts did prove profitable, it is clear that if the defense version of the employment contract were accepted, the plaintiff could not recover in this action).

In answer to special interrogatories, the jury found against the plaintiff on his claim of an express 5 percent contract, and found against the defendant on its contention of a bonus contract; but awarded $135,981.33 to the plaintiff on the *quantum meruit* theory.[3]

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[3]After the jury was discharged, the foreman handed the court reporter a slip of paper stating how the verdict was calculated. Because of the late and informal filing, this document is not a part of the record. If the document does represent the basis of the jury's verdict, it seems probable that the jury valued plaintiff's services at the rate of 5% of the gross amount of the government contracts up to $500,000 and 3% on the excess; subtracted the salary and other compensation already received by the plaintiff; and added interest to the date of the verdict.

I.

In March of 1959, and for many years before, plaintiff was a self-employed manufacturer's representative. Generally, he represented not more than three or four clients at any given time and was paid on a commission basis, usually with stated advances for his expenses. Plaintiff sought to interest the corporate defendant, through its president and controlling stockholder, Russo, in engaging plaintiff to obtain government contracts. The corporate defendant operated a successful machine-shop type of business, with recently expanded facilities, and Russo was interested in branching out into government work.

On March 15, 1959, plaintiff commenced work for the defendant, with the understanding that, if he and Russo worked well together, as they then expected to, plaintiff would shortly phase out his other clients and would become defendant's full-time employee, whose job it would be to ferret out suitable opportunities for the defendant to bid upon government contracts, obtain "bid sets," help prepare the bids, and supervise the administration of any government contracts which might result. By July 20, 1959, the transition to full-time employee had been completed.

The precise terms of plaintiff's employment are in dispute, as noted earlier. It is agreed, however, that plaintiff was paid the sum of $50 per week toward his expenses when he started to work part-time, and that he was paid $200 per week regularly after becoming a full-time employee. Until April 18, 1960, plaintiff's checks bore the notation "engineering services" or some similar designation, and there was no withholding of federal income tax or social

security. On April 18, 1960, the plaintiff went on the regular payroll, with the usual deductions. It seems to be agreed that this change was brought about when it developed that the plaintiff was unable to pay an income tax instalment which was due on April 15, 1960, and did not represent any actual change in his employment agreement.

During the year 1960, proceedings were under way for the corporation to "go public"; these activities culminated in the public issue of stock in October of 1960. During the early part of 1961, plaintiff, with the approval of Russo, began negotiations looking toward the merger of the defendant corporation with, or the sale of its assets to, American Machine & Foundry Corporation (AMF). However, before these efforts could be brought to fruition, Russo decided instead to sell his own controlling interest in the corporation to an investment group headed by Lomasney, Loving & Co. (hereinafter "Lomasney"). When it developed that the corporation was then losing money, the Lomasney group insisted upon replacing Mr. Russo as chief executive officer of the defendant, as a condition of its proposed purchase.

On May 9, 1961, Russo entered into a formal agreement for the sale of his stock, and various related agreements which will be discussed below, and on the same date the plaintiff was elected president of the defendant corporation. It is agreed that whatever the earlier arrangements may have been for the compensation of the plaintiff, all services rendered after May 9, 1961 have been fully compensated by his salary as president (originally $15,000 per year, later $20,800 per year).

Plaintiff's tenure as president was relatively brief: the corporation's losses continued to mount, and on Janu-

ary 5, 1962, without any advance notice, plaintiff's employment was in all respects terminated.

II.

The crucial issue in deciding the defendant's motion for judgment n.o.v. relates to a letter-agreement executed by the plaintiff on May 9, 1961. It is contended that this agreement operated as a release of any claim which the plaintiff had to compensation for the period prior to the agreement. This release formed the basis for a defense "motion for summary judgment at pre-trial" which was fully briefed and argued in November of 1966 before another judge of this Court. On November 9, 1966, an order was entered, without opinion, denying the motion for summary judgment.[4]

Charles A. Russo and Josephine Russo, his wife, were the owners of 127,400 shares of common stock of the defendant corporation. On May 9, 1961, as mentioned above, they entered into an agreement to sell 100,000 shares of their stock to the Lomasney group, for a total consideration of $500,000.

One hundred and twenty-five thousand dollars was paid at the signing of the agreement, and the balance of $375,000 was to be paid one year later. In the interim, the stock was to be held in escrow, the purchasers having the right to vote the stock.

On the same date, Russo and the plaintiff entered into the following letter-agreement:

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[4]Earlier, defendant unsuccessfully sought dismissal of the complaint on the same grounds.

"May 9, 1961

"George R. Eulo
100 Third Avenue
Haddon Heights, New Jersey

"Dear Sir:

"Reference is made to an agreement made this date between the undersigned and Lomasney, Loving & Co. for the sale and purchase of 100,000 shares of Carco Industries, Inc., common stock.

"Upon the payment of the sum of $500,000 to me, as provided therein, I agree to deliver to you 20,000 shares of Carco common stock, free of charge and any obligation on your part for the said shares of stock, including the gift tax, if any.

"I agree to deliver the said 20,000 shares of Carco common stock to Grace National Bank of New York, as Escrow Agent, endorsed in blank, with instructions to deliver the said 20,000 shares of Carco common stock to you upon my receipt of the sum of $375,000, representing the balance of the purchase price payable under the aforesaid agreement.

"I further agree to deposit with the Escrow Agent sufficient funds for the documentary tax stamps to be affixed to the said 20,000 shares of Carco common stock, if any be required.

"I further agree to execute any other documents necessary or required to effectuate the terms herein.

"You agree to release any and all claims against Carco Industries, Inc., if any there be, as of this date.

Very truly yours,
(s) Charles A. Russo
Charles A. Russo

"Agreed and Accepted
this 9th day of May 1961

(s) George R. Eulo
George R. Eulo

On May 12, 1961, counsel handling the transaction, apparently then acting for all parties, forwarded the certificate for the 127,400 shares of Russo stock to the escrow agent, with instructions to deliver 100,000 shares to the Lomasney group "on or before May 9, 1962 upon the payment . . . of the sum of $375,000 on or before said date"; and to deliver "20,000 shares to George R. Eulo on or before May 9, 1962 to be delivered only in the event that payment of the sum of $375,000 is made by Lomasney, Loving & Co. to the bank for the aforesaid 100,000 shares of Charles A. Russo and Josephine Russo" (Ex. D-32). Plaintiff was sent a copy of the forwarding letter embodying these terms.

On May 17, 1961, at the request of the plaintiff, Mr. Russo wrote him a second letter which included the statement, "I agree that the 20,000 shares . . . shall become your property as of the date of this letter. Delivery of said stock shall be made to you by the Escrow Agent on May 9, 1962, or sooner, if the 100,000 shares deposited with the Escrow Agent is [sic] delivered to Lomasney, Loving & Co. under an agreement dated May 9, 1961" (Ex.

P-9). In August of 1961, an attempt was made to have the escrow agent immediately transfer the 20,000 shares to the plaintiff, but this attempt was thwarted by Mrs. Josephine Russo, who notified the escrow agent that she would not agree to any such modification of the original arrangement.

As of the time of trial of this case, the Russo shares were still being held in escrow. The Lomasney group had not completed settlement, and the entire stock-sale transaction was the subject of litigation in New York.

A careful reading of the letter of May 9, 1961, in light of the undisputed circumstances then prevailing, makes it clear that the parties undoubtedly intended the obligations created by that letter to replace whatever obligations were then owing the plaintiff by the defendant corporation. Plaintiff's own testimony makes this conclusion inescapable (N.T. pp. 85-87, 307-308; 315 to 353; 407-412; 448). I concluded at the time of trial that since plaintiff had not received the stock, and since the time within which the release agreement contemplated that he would receive it had expired, plaintiff was at liberty to disregard the release and reinstate and sue upon the original obligation of the defendant corporation. I am now convinced that this ruling was erroneous: it is clear that the plaintiff was granting a present release, in exchange for a conditional promise of substituted performance. Brill's Estate, 337 Pa. 527 (1940); *Compare* A.L.I. Restatement of Contracts §402 (1) *with* §404 (1). Since I have determined that there was a present release, under any view of the matter, the original corporate obligation was extinguished, and plaintiff should be left to his remedies, if any, under the release

agreement.[5] *See, generally,* Corbin on Contracts §§1268, 1269, 1274, 1275; Williston on Contracts, §§1873 et seq.; A.L.I. Restatement of Contracts §402, Comment (a), (h).

Moreover, the mere fact that plaintiff has not yet received the shares of stock does not justify the conclusion that the Russo estate is in default under the release agreement. As matters stood at the time of trial, it was not yet possible to determine this question. (Also, it would seem that the pending New York litigation should serve to resolve such matters.)

Plaintiff sought to escape the effect of the release on two grounds. First, plaintiff contended that, notwithstanding the language of the May 9, 1961 letter, he felt that he was entitled to receive the shares of stock immediately, rather than await the outcome of the Lomasney-Russo transaction. In this respect, however, the letter clearly speaks for itself, and its effect cannot be modified by plaintiff's alleged previous understandings. See Caplan v. Saltzman, 407 Pa. 250 (1962). It is unquestionably clear from plaintiff's own testimony (as well as from the affidavit he filed in connection with the motion for summary judgment) that he agreed to the deferred delivery arrangement set forth in the letter; and that he was given a copy of the escrow letter of May 12, 1961, within a day or two thereafter (N.T. p. 425). Moreover, the second Russo letter, dated May 17, 1961, written at plaintiff's request, further confirms the fact that immediate delivery was not contemplated.

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[5]At one point in the trial, plaintiff was afforded the opportunity to amend his complaint to substitute a claim for enforcement of the release agreement, but declined to do so. (N.T. 578-582)

Plaintiff further contended that the release agreement of May 9, 1961 was invalid because the letter was signed only by Charles A. Russo, whereas the shares of stock were owned by Charles A. Russo and Josephine Russo, his wife, jointly, and because plaintiff was in ignorance of the true state of affairs. Plaintiff's own testimony as to whether or not he knew that the Russo stock was registered in the names of both Russos is in hopeless conflict. (*Compare* his testimony at pp. 305-06, 420, *with* his testimony at pp. 312, 374.) It would seem incontrovertible that he knew the true situation upon receipt of the escrow letter of May 12, 1961, but made no attempt to repudiate the release on the grounds stated. See Mannke v. Benjamin Moore & Co., 375 F. 2d 281 (3rd Cir. 1967). Indeed, he thereafter seems enthusiastically to have ratified the arrangement by acting as if the stock were his own (e.g., refusing to "sell" it, N.T. p. 448).

In any event, whether plaintiff knew the stock was jointly owned or not, it is clear that Mr. Russo was authorized to deal with the stock on behalf of his wife as well as himself, insofar as the agreement of May 9, 1961 is concerned. Mrs. Russo has never made any attempt to repudiate that agreement and testified at trial that she has always regarded herself as bound thereby. The fact that Mrs. Russo later refused to agree to a change in the agreement does not alter the situation.

For all of the foregoing reasons, I am now convinced that the defendant's motion for a directed verdict should have been granted, because the present claims are all barred by the release agreement of May 9, 1961.

The only remaining point of doubt as to the propriety of granting judgment n.o.v. is whether the previous rulings

by other members of this Court, denying defendant's motion to dismiss and motion for summary judgment, necessarily established "the last of the case," insofar as interpretation of the release agreement is concerned. While this consideration may have had an influence upon my trial rulings on this issue, I am now satisfied that the denial of these motions did not purport to be a definitive interpretation of the release agreement, and did not preclude a contrary ruling at a later stage of the litigation. Petition of Kinsman Transit Co., 388 F. 2d 821 (2nd Cir. 1968); Kaminsky v. Abrams, 281 F. Supp. 501 (S.D. N.Y. 1968); 1B Moore, Federal Practice, §§0.404 (1), (4). The previous orders were entered without opinion, and may very well have represented merely a conclusion that there were possible issues of fact to be resolved. The present determination is being made upon a greatly expanded record. There is therefore not necessarily any inconsistency between my present ruling and the previous orders entered in this litigation. An order will be entered, granting defendant's motion for judgment n.o.v.

In compliance with Fed. R. Civ. P. 50(c), it is now necessary to rule upon the defendant's alternative motion for a new trial. In the event judgment n.o.v. is held to be improper, it is my opinion that a new trial is required. Even if it should be held that the release cannot be construed to bar all of the plaintiff's claims as a matter of law, a fact-finder could find that such was the intention of the parties, and it would therefore have been erroneous to decline to submit the conflicting factual contentions surrounding the release to the jury.

Other grounds asserted by the defendant must now be considered. The principal thrust of the motion for a new

trial relates to the sufficiency of the evidence to support the only special finding which could justify the *quantum meruit* verdict.

Defendant argues that since there was no one witness whose testimony supports the precise valuation fixed by the jury (i.e., no witness who testified that the fair and reasonable value of plaintiff's services, or of like services, was in the amount set by the jury), the verdict cannot stand. There is, of course, no merit to this argument, as thus baldly stated. The jury had the right to pick and choose, and could accept part of the testimony of each of several witnesses, put the parts together, and arrive at a composite calculation.

Nevertheless, it is true that the verdict of the jury in this case necessarily means that the jury did not believe most of the plaintiff's testimony, and likewise disregarded most of the crucial evidence of the defense. Under these circumstances, it is appropriate to search the record with care for possible trial errors which may have misled the jury. While this point has not been raised by counsel, it does appear upon careful analysis of the wording of the special interrogatories and the related portions of the charge of the court, that the jury may have been under the impression that, having found that there was no express agreement for a five percent commission as contended by the plaintiff, and that there were no bonus agreement as contended by the defendant, it must automatically follow that *quantum meruit* recovery should be awarded. In view of the real possibility that the jury's unusually selective appraisal of the evidence may have occurred under the misapprehension that they were required to re-

turn a quantum meruit recovery unless they accepted one or the other of the two computing versions of the express arrangement, I believe the only appropriate action is to award a new trial.

I am fortified in this conclusion by the fact that, in my judgment, no verdict in excess of $40,000 plus interest thereon from January 5, 1962, could be permitted to stand.

On October 13, 1960, in connection with the public issuance of stock, the corporation issued its prospectus, which contained representations to the effect that the plaintiff's additional compensation would not, under any circumstances, exceed $40,000 in amount. It may be, as testified by the plaintiff, that this representation was originally included in the prospectus without plaintiff's knowledge or approval. But it is clear from plaintiff's own testimony that he knew of the representation within a very few days after it was originally furnished to counsel, and that at no time did he make any attempt to alert counsel handling the stock issue, the underwriters, the public, the SEC, or anyone else, that this representation was inaccurate.

In my view, this set of facts precludes recovery by plaintiff in this action of any sum in excess of $40,000 (plus interest). To permit recovery in excess of that amount would mean that the prospectus contained a serious misrepresentation of fact, in clear violation of the Securities Act of 1933, 15 U.S.C. §§77 (j), 77 (aa) 77 (1).

In Dippel v. Brunozzi, 365 Pa. 364 (1950), involving a contract of sale at a price in excess of that permitted by price control legislation, the Pennsylvania rule was stated as follows:

"The general rule is that an agreement which violates a provision of a statute, or which cannot be *performed* without a violation of such a provision is illegal and void." At page 27. (Emphasis added.)

It would be contrary to public policy to permit the plaintiff to acquiesce in the prospectus representation as to the limitation on the amount of his compensation, and, after investors have relied thereon, to deplete the corporate treasury by collecting sums in excess of the limitation stated. See A.L.I. Restatement of Contracts §577.

A kinder, and perhaps more accurate, statement of the proper decision of this issue is that, in view of the prospectus statement, any jury verdict in excess of the amount stated in the prospectus is clearly contrary to the weight of the evidence and must be set aside. Under the circumstances, particularly in view of the possibility that the jury may have misunderstood the relationship between an express contract and a *quantum meruit* return, I do not believe the error can be cured by a remittitur.

It is also appropriate to observe that the trial of this case was unduly prolonged, owing in part to the absence of meaningful pre-trial procedures, and counsel's rather old-fashioned concept that the trial was the place to conduct discovery proceedings and verbal sparring matches. The record is cluttered with an inordinate amount of documentary exhibits having little or not bearing upon the jury's function. The questions of counsel were verbose and often unclear, and the cross-examination lengthy and disorganized. Defense counsel was himself largely responsible for this trial confusion, but by no means solely responsible. On balance, I am inclined to believe that a new trial should be granted in the interests of justice.

Accordingly, in the event that my determination of the motion for judgment n.o.v. should be reversed or vacated, a new trial should be granted. This does not mean a new trial as to all parties or as to all issues. The judgment in favor of the Russo estate, and in favor of the defendant, Baldinger, are not presently challenged, and, in any event, were not substantially affected by the factors listed above, requiring a new trial. Moreover, plaintiff's claims for severance pay and for damages relating to his discharge on January 5, 1962, were properly decided by the jury, are not subject to any of the infirmities mentioned above, and are not presently challenged by anyone. Therefore, in the event a new trial is required, it should be limited to plaintiff's claim for additional compensation for services rendered between March 15, 1959 and May 9, 1961.

ORDER

And Now, this 27th day of March, 1969, it is hereby Ordered:

1. That the motion of the corporate defendants for judgment n.o.v. in their favor is hereby GRANTED, and judgment is hereby entered in favor of the defendants.

2. Alternatively, pursuant to Fed. R. Civ. P. 59 (c), that, in the event the order embraced in paragraph 1 hereof is reversed or vacated, the corporate defendants' motion for a new trial shall be GRANTED, limited to the issues between plaintiff and the corporate defendant re-

lating to plaintiff's claim for additional compensation for services rendered between March 15, 1959 and May 9, 1961.

3. Judgment is entered on the verdicts in favor of the remaining defendants.

(s) John P. Pullam
J.

III.

ILLEGALITY-INFLUENCE PEDDLING

CODE OF FEDERAL REGULATION, TITLE 41

SUBPART 1-1.5—CONTINGENT FEES

§1-1.500 *Scope of subpart*

This subpart prescribes the use by executive agencies of the "covenant against contingent fees" and sets forth the policies, forms, methods, procedure, principles, and standards related thereto. The requirements of this subpart have as their objective the prevention of improper influence in connection with the obtaining of Government contracts, the elimination of arrangements which encourage the payment of inequitable and exorbitant fees bearing no reasonable relationship to the services actually performed, and the prevention of unwarranted expenditure of public funds which inevitably results therefrom. The methods used to achieve these objectives are the requirement for disclosure of the details of arrangements under which agents represent concerns in obtaining Government contracts, and the prohibiting, by use of the covenant against contingent fees, of certain types of contractor-agent arrangements.

§1-1.502 *Improper influence*

The term "improper influence" means influence, direct or indirect, which induces or tends to induce consider-

ation or action by any employee or officer of the United States with respect to any Government contract on any basis other than the merits of the matter.

ILLEGALITY-SECURITIES ACT OF 1933 UNITED STATES CODE, TITLE 15

§77j. *Information required in prospectus*

(a) Except to the extent otherwise permitted or required pursuant to this subsection or subsections (c), (d), or (e) of this section—

(1) a prospectus relating to a security other than a security issued by a foreign government or political subdivision thereof, shall contain the information contained in the registration statement, but it need not include the documents referred to in paragraphs (28)-(32), inclusive, of schedule A of section 77aa of this title; . . .

(b) In addition to the prospectus permitted or required in subsection (a) of this section, the Commission shall by rules or regulations deemed necessary or appropriate in the public interest or for the protection of investors permit the use of a prospectus for the purposes of subsection (b) (1) of section 77e of this title which omits in part or summarizes information in the prospectus specified in subsection (a) of this section. A prospectus permitted under this subsection shall, except to the extent the Commission by rules or regulations deemed necessary or appropriate in the public interest or for the protection of investors otherwise provides, be filed as part of the registration statement but shall not be deemed a part of such registration statement for the purposes of section 77k of this title. . . .

(c) Any prospectus shall contain such other information as the Commission may by rules or regulations require as being necessary or appropriate in the public interest or for the protection of investors.

(77aa *Schedule of information required in registration statement*

Schedule A

(14) the remuneration, paid or estimated to be paid, by the issuer or its predecessor, directly or indirectly, during the past year and ensuing year to (a) the directors or persons performing similar functions, and (b) its officers and other persons, naming them wherever such remuneration exceeded $25,000 during any such year;

(24) dates of and parties to, and the general effect concisely stated of every material contract made, not in the ordinary course of business, which contract is to be executed in whole or in part at or after the filing of the registration statement or which contract has been made not more than two years before such filing. Any management contract or contract providing for special bonuses or profit-sharing arrangements, and every material patent or contract for a material patent right, and every contract by or with a public utility, company or an affiliate thereof, providing for the giving or receiving of technical or financial advice or service (if such contract may involve a charge to any party thereto at a rate in excess of $2,500 per year in cash or securities or anything else of value), shall be deemed a material contract;

(25) a balance sheet as of a date not more than ninety days prior to the date of the filing of the registration statement showing all of the assets of the issuer, the nature

and cost thereof, whenever determinable, in such detail and in such form as the Commission shall prescribe (with intangible items segregated), including any loan in excess of $20,000 to any officer, director, stockholder or person directly or indirectly controlling or controlled by the issuer, or person under direct or indirect common control with the issuer. All the liabilities of the issuer in such detail and such form as the Commission shall prescribe, including surplus of the issuer showing how and from what sources such surplus was created, all as of a date not more than ninety days prior to the filing of the registration statement. If such statement be not certified by an independent public or certified accountant, in addition to the balance sheet required to be submitted under this schedule, a similar detailed balance sheet of the assets and liabilities of the issuer, certified by an independent public or certified accountant, of a date not more than one year prior to the filing of the registration statement, shall be submitted;

(26) a profit and loss statement of the issuer showing earnings and income, the nature and source thereof, and the expenses and fixed charges in such detail and such form as the Commission shall prescribe for the latest fiscal year for which such statement is available and for the two preceding fiscal years, year by year, or, if such issuer has been in actual business for less than three years, then for such time as the issuer has been in actual business, year by year. If the date of the filing of the registration statement is more than six months after the close of the last fiscal year, a statement from such closing date to the latest practicable date. Such statement shall show what the practice of the issuer has been during the three years or lesser period as to the character of the charges, dividends

or other distributions made against its various surplus accounts, and as to depreciation, depletion, and maintenance charges, in such detail and form as the Commission shall prescribe, and if stock dividends or avails from the sale of rights have been credited to income, they shall be shown separately with a statement of the basis upon which the credit is computed. Such statement shall also differentiate between any recurring and nonrecurring income and between any investment and operating income. Such statement shall be certified by an independent public or certified accountant;

§771. *Civil liabilities arising in connection with prospectuses and communications*

Any person who—

(1) offers or sells a security in violation of section 77e of this title, or

(2) offers or sells a security (whether or not exempted by the provisions of section 77c of this title, other than paragraph 2 of subsection (a) of said section), by the use of any means or instruments of transportation or communication in interstate commerce or of the mails, by means of a prospectus or oral communication, which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements, in the light of the circumstances under which they were made, not misleading (the purchaser not knowing of such untruth or omission), and who shall not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of such untruth or omission,

shall be liable to the person purchasing such security from him, who may sue either at law or in equity in any court of competent jurisdiction, to recover the consideration paid for such security with interest thereon, less the amount of any income received thereon, upon the tender of such security, or for damages if he no longer owns the security. May 27, 1933, c. 38, Title I, §12, 48 Stat. 84; Aug. 10, 1934, c. 667, Title I, §8, 68 Stat. 686.